In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2064

THOMAS DIBELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was adjudged in civil contempt by the United States District Court for the Eastern District of New York for refusing to answer questions before a grand jury after having been granted immunity under 18 U.S.C. 6002 and 6003. He was sentenced to a prison term of six months or the life of the grand jury, whichever proved to be shorter, unless he purged himself at an earlier date by complying with the order to testify. The court of appeals affirmed (Pet. App. A).

Petitioner contends that the grant of immunity, and hence the order to testify, was invalid under Section 6003 and the regulations promulgated by the Attorney General (28 C.F.R. 0.175). Although the United States Attorney for

the district participated in the request to the district court for an immunity grant, petitioner contends that Section 6003 was not complied with because the application to the designated Assistant Attorney General for authorization to seek the grant was made by a Department of Justice Special Attorney without the knowledge or approval of the United States Attorney. The court of appeals, on whose opinion we rely, correctly read Section 6003(b) to require participation by the United States Attorney only in the request to the court and not in the intradepartmental procedures seeking authorization to make such a request (Pet. App. A, p. 5a). As the court explained (Pet. App. A, pp. 4a-5a), petitioner claims that 18 U.S.C. 6003:

> contemplates a three-step method of obtaining immunity orders for grand jury witnesses: (1) application to the Attorney General, his Deputy or designate; (2) approval by one of these officials, and (3) subsequent request to the court. Appellant claims that steps one and three in this procedure require the personal approval and participation of the United States Attorney for the district in which the grand jury is convened. It is conceded that in this case the Special Attorney—without the knowledge of the United States Attorney—procured the Department of Justice approval and applied to the district court to immunize DiBella. According to appellant, this rendered invalid both the order of immunity and the contempt order based upon it.
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> We do not concur in this reasoning. The statute says nothing about *how* Department of Justice approval—admittedly present here—must be obtained. In the absence of specific contrary language, we see no reason why the request to the Attorney General cannot be made by an authorized agent other than the

> United States Attorney—in this instance, the Special Attorney. Congressional concern over the process would appear satisfied if, as was the case here, both the Attorney General or his statutory designate and the United States Attorney agree on the desirability of immunity before a court actually grants it.* * * [Footnote omitted.]

The court of appeals also correctly concluded that nothing in 28 C.F.R. 0.175 or in *United States* v. *Giordano*, No. 72-1057, decided May 13, 1974, adds to the statutorily required procedures (Pet. App. A, p. 5a, n. 3). *Giordano* requires that the subordinate official to the Attorney General who authorizes a request for court-ordered electronic surveillance (an issue not involved in this case) be properly designated by the Attorney General to consider applications for such authorizations; the holding in that case was dictated by the specific language of 18 U.S.C. 2516 relating only to electronic surveillance applications and requiring that authorization for such applications be made by the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General." Moreover, even if one were to conclude that *Giordano* was in some way applicable to the situation presented by this case, there is no question here that the designation of the Assistant Attorney General who authorized immunity was proper. See 18 U.S.C. 6003(b); 28 C.F.R. 0.175(a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.